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No. 80-1010

In the Supreme Court of the United States

OCTOBER TERM, 1980

P. W. CURREY and MRS. JAMES D. CURREY
d/b/a CURREY & CURREY
a/k/a CURREY, SHIELDS & CURREY,
Petitioners,

VERSUS

CORPORATION COMMISSION
OF THE STATE OF OKLAHOMA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF IN OPPOSITION OF THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

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QUESTION PRESENTED

May the Oklahoma Corporation Commission, acting under the police power of the state, require a non-Indian operator of purging wells located on restricted Choctaw land to plug said wells?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT:	
I. The petition for writ of certiorari should not be granted herein as there is not a substantial federal question and there is an adequate indepenent nonfederal ground as a basis for supporting the judgment below	5
II. The Oklahoma Corporation Commission is authorized to prescribe rules and regulations for the plugging of all abandoned oil and gas wells and to enforce such rules as a valid exercise of the state's police power	8
III. The Oklahoma Corporation Commission rules and regulations regarding the plugging and abandoned oil and gas wells imposes a responsibility and duty upon the operator of such wells and does not attach to the land itself	10
IV. Public Law 80-336, found in 61 Stat. 731, Act of August 4, 1947, Ch. 458, evidences Congress' intent that all oil and gas conservation laws of the State of Oklahoma apply to all restricted lands of the Five Civilized Tribes	16

TABLE OF CONTENTS CONTINUED PAGE

CONCLUSION ____ 20

CERTIFICATE OF SERVICE follows brief

APPENDIX A — Opinion of the Oklahoma Supreme Court, filed June 12, 1979 ____ A-1

APPENDIX B — Correction Order of Oklahoma Supreme Court, filed September 22, 1980 ____ B-1

APPENDIX C — Oklahoma Plugging Statutes ____ C-1

TABLE OF AUTHORITIES

Cases	PAGE
Amax Petroleum Corporation v. Corporation Commission, 552 P.2d 387 (Okl. 1976)	6, 14
Ashland Oil, Inc. v. Corporation Commission, 595 P.2d 423 (Okl. 1979)	14
Atchison T. & S.F. Ry. Co. v. Corporation Commission, 68 Okl. 1, 170 P. 1156 (1914)	9
Bryan v. State, 133 Okl. 213, 271 P. 1020 (1928)	9, 15
Currey v. Corporation Commission of Oklahoma, 617 P.2d 177 (Okl. 1980)	1, 6
Gannon v. Mobil Oil Company, 573 F.2d 1158 (10th Cir. 1978), cert. den. 439 U.S. 867, 99 S.Ct. 192, 58 L.Ed.2d 177	8, 15
Georgia R.R. & Banking Co. v. Smith, 128 U.S. 174, 9 S.Ct. 47, 32 L.Ed. 377	17
Gruver v. Secretary of Health, Education and Welfare, 426 F.2d 1195 (C.. App. D.C. 1969), cert. den. 397 U.S. 977, 90 S.Ct. 1092, 25 L.Ed.2d 272 (1970)	18
Jicarilla Apache Tribe v. United States, 601 F.2d 1116 (10th Cir. 1979), cert. den. 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979)	19
Johnson v. Thornburgh, 276 U.S. 601, 48 S.Ct. 322, 72 L.Ed. 725 (1928)	7
Loriaux v. Corporation Commission, 514 P.2d 941 (Okl. 1973)	15
Magnolia Petroleum v. Witcher, 141 Okl. 175, 284 P. 297 (1930)	9
Minshall v. Corporation Commission, 485 P.2d 1058 (Okl. 1971)	13
Motorlines, Ltd. v. United States, 215 F.Supp. 345 (N.D. Ohio 1963)	17, 19
Oklahoma City v. Corporation Commission, 80 Okl. 194, 195 P. 498 (1921)	9

AUTHORITIES CONTINUED PAGE

Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) 6, 19

Planters' Cotton & Ginning Co. v. West Bros., 82 Okl. 145, 198 P. 855 (1921) 9

Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 7

Salmon Corporation v. Forrest Oil Corporation, 536 P.2d 909 (Okl. 1975) 11

Sheridan Oil Company v. Wall, 187 Okl. 398, 103 P.2d 507 (1940) 9

Southern California Edison Co. v. Herminghaus, 275 U.S. 486, 48 S.Ct. 27, 72 L.Ed. 387 (1927) 7

Stembridge v. Georgia, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952) 7

United States v. 79.95 Acres of Land, etc., Rogers County, Okl., 459 F.2d 185 (10th Cir. 1972) 15

United States v. Wewoka Creek W. & S. Con. Dist. No. 2 of Okl., 222 F.Supp. 225 (E.D. Okl. 1963) 16

Wakefield v. State, 306 P.2d 305 (Okl. 1957) 8

Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) 19

Federal Statutes

28 U.S.C. Section 1257 5

Act of June 16, 1906, 34 Stat. 267 5

Act of August 14, 1947, 61 Stat. 731, Public Law 80-336, ch. 458, Section 11 ..... 16, 18

Federal Regulations

25 C.F.R. Section 174.33 12

Supreme Court Rules

Rule 17 5

Oklahoma Constitution

Art. I, Section 3 5

Art. IX 8

AUTHORITIES CONTINUED PAGE

Oklahoma Statutes

Okla. Laws 1909, c.XXVI, Art. II, Section 7a 10
17 O.S. Section 53 ..... 2, 9, 10
52 O.S. Section 296 19
52 O.S. Section 303 19
52 O.S. Sections 309-318.1 ..... 2, 10, 13
52 O.S. Section 310 ..... 14, 15

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BRIEF IN OPPOSITION OF THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

The Respondents, Corporation Commission of the State of Oklahoma, respectfully prays this Court to not issue a writ of certiorari to review the judgment and opinion of the Oklahoma Supreme Court entered in this proceeding on June 12, 1979; rehearing denied and correction order entered September 22, 1980.

OPINION BELOW

The opinion of the Oklahoma Supreme Court, reported as *Currey* v. *Corporation Commission of Oklahoma,* 617 P.2d 177 (Okl. 1980), appears in Appendix "A" herein, as corrected in Appendix "B" herein.

STATUTORY PROVISIONS INVOLVED

Oklahoma Statutes, Title 17, sec. 53, Rules and Regulations — Plugging Wells; Title 52, sec. 309, Findings and Declarations; Title 52, sec. 310, Leaking Wells — Entry Upon Land to Plug, Replug or Repair — Emergencies; Title 52, sec. 311, Liability for Damages; Title 52, sec. 312, Responsibility for Future Remedial Work; Title 52, sec. 313, No Admission of Liability or Discharge of Action; Title 52, sec. 314, Right of Action for Costs Involved — Lien; Title 52, sec. 315, Supplemental Remedy; Title 52, sec. 316, Proceedings; Title 52, sec. 317, "Person" Defined; Title 52, sec. 318, Remedial Work — Contracts Upon Competitive Bids; Title 52, sec. 318.1, Agreement as to Compliance with Drilling and Plugging Regulations — Recovery of Costs.

See Appendix "C".

STATEMENT OF THE CASE

In the early 1950's, petitioners, a Texas partnership, obtained a lease through the Bureau of Indian Affairs (Bureau) to certain restricted Choctaw lands located in Stephens County, Oklahoma. Upon execution of the lease and the posting of required surety, the Bureau turned supervision over to the United States Geological Survey (USGS). Petitioners drilled three wells: the Sophie Harrison No. 1 located in the NW/4 NW/4 NW/4, the Sophie Harrison B-1 located in the SE/4 NW/4 NE/4 NW/4, and the Sophie Harrison B-2 located in the SW/4 NW/4 NW/4, all in Section 10, Township 3 North, Range 5 West, Stephens County, Oklahoma.

Completion reports were filed with the USGS for the three wells: Sophie Harrison No. 1 on March 29, 1954; Sophie Harrison B-1 on August 4, 1954; and Sophie Harrison B-2 on August 17, 1954.

In the mid-1950's, each well was the subject of a"Notice of Intent to Abandon", filed with the USGS, which notice contained a description of the method by which Petitioners intended to plug the wells. Such methods were utilized in the plugging, reported to and approved by the USGS. An incomplete plugging report for the Sophie Harrison B-1 was filed with the Oklahoma Corporation Commission on July 20, 1954, but no intent to drill, completion report or intent to plug were ever filed with the Commission nor was the plugging under the supervision of Commission personnel. The USGS then recommended to the Bureau that Petitioners bond be released and it was so released shortly thereafter.

On July 29, 1974, a plugging record for the Sophie Harrison B-1 was filed with the Oklahoma Corporation Commission. Later, in 1974, one of the wells experienced a surface break-out. Attempts by third parties (not parties here or below) to replug the well were unsuccessful and on March 12, 1976, the district manager, a representative of the Oklahoma Corporation Commission, made his first inspection finding the Sophie Harrison B-2 to be purging salt water at the rate of 45 barrels per day. A complaint was filed with the Commission. The Sophie Harrison B-1 was made the subject of a complaint later in 1977 after it was discovered to be also purging salt water on April 13, 1977.

The Director of Conservation filed an application for an order requiring Currey & Currey, as owner and operator, to plug an abandoned and purging oil or gas well, the Sophie Harrison B-2, located in the SW/4 NW/4 NW/4 of Section 10, Township 3 South, Range 5 West, Stephens County, Oklahoma. The application further stated that the well had not produced oil or gas in excess of six months and that the operator had refused, neglected and failed to plug the well in accordance with the laws, rules and regulations of the Corporation Commission and the State of Oklahoma.

Prior to the hearing, by response to the application, two other wells, the Sophie Harrison No. 1 and the Sophie Harrison B-1, were included at the request of the petitioners herein. The cause came on for hearing April 26, 1977, pursuant to notice given as required by law and the rules of the Commission. The trial examiner filed his report recommending an order be issued requiring Currey & Currey to plug the Sophie Harrison B-1 and the Sophie Harrison B-2. Petitioners herein filed exceptions to the report of the trial examiner and argued the exceptions before the Commission on September 12, 1977. The Commission took the cause under advisement. On January 10, 1978, the Commission adopted the trial examiner's report and issued Order No. 137283. Currey & Currey, petitioners herein, appealed from the Order to the Oklahoma Supreme Court by Petition in Error asserting, inter alia, the lack of Commission jurisdiction over restricted Indian land. The Oklahoma Supreme Court affirmed the Commission Order, from which Petitioners' sought this relief.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED HEREIN AS THERE IS NOT A SUBSTANTIAL FEDERAL QUESTION AND THERE IS AN ADEQUATE INDEPENDENT NON-FEDERAL GROUND AS A BASIS FOR SUPPORTING THE JUDGMENT BELOW.

Petitioner invokes this Court's jurisdiction under the provisions of 28 U.S.C. sec. 1257(3) and Rule 19 (presently Rule 17) of the Supreme Court Rules stating that Oklahoma's oil and gas statutes are repugnant to the constitution, laws and regulations of the United States in that such laws vest the Oklahoma Corporation Commission with jurisdiction over restricted Indian land. However, nowhere in the Oklahoma statutes nor in the rules and regulations of the Oklahoma Corporation Commission is there language attempting to assume proprietary powers over restricted Indian land. On the contrary, the third paragraph of Section 3 of the Oklahoma Enabling Act, Act of June 16, 1906 (34 Stat. 267) required that the proposed Oklahoma Constitution contain a disclaimer clause. Section 3 of Article I of the Oklahoma Constitution contains such disclaimer clause:

> "The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. . . ."

The Oklahoma Supreme Court properly stated that "Oklahoma's disclaimer of right and title to Indian lands is a disclaimer of proprietary rather than governmental interests. " 'The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of the people on those lands, as long as that does not affect the title to the land.' " *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962), cited in *Currey* v. *Corporation Commission of Oklahoma*, 617 P.2d 177, 180 (Okl. 1980).

The Oklahoma Corporation Commission has not attempted, nor is it attempting here, to assume proprietary power over restricted Indian land. The Respondents contend that the Oklahoma Corporation Commission has the authority, under the police power of the state, to impose certain duties and responsibilities on operators of oil and gas wells located within Oklahoma. The duty and responsibility of properly plugging oil and gas wells rests with the operator of such wells and is not an obligation touching the land itself, the Indian or tribal owner or the federal government. The Court stated in *Amax Petroleum Corporation* v. *Corporation Commission*, 552 P.2d 387 (Okl. 1976):

> " . . . thus, the person to plug the well is the lease operator, not a stranger to the operations . . ."

This is not to say, however, that the same result would obtain were the operator an Indian operator/owner on restricted Indian land, in which case resort would have to be had to the various statutes and regulations delineating federal jurisdiction, state jurisdiction and tribal jurisdiction.

That issue is not presented here. The issue that is presented, whether the Oklahoma Corporation Commission has authority to order a non-Indian operator of wells on restricted Choctaw land to plug such wells, is not a substantial federal question and is not the type of case which need be brought before this Court. *Southern California Edison Company* v. *Herminghaus,* 275 U.S. 486, 48 S.Ct. 27, 72 L.Ed. 387 (1927).

In addition, the Oklahoma Supreme Court held that the Oklahoma Corporation Commission has the authority to order such plugging under the oil and gas statutes of Oklahoma thereby providing an independent adequate nonfederal ground as a basis for supporting the judgment rendered below. *Johnson* v. *Thornburgh,* 276 U.S. 601, 48 S.Ct. 322, 72 L.Ed. 725 (1928). This Court has also dismissed a writ of certiorari as improvidently granted in a case where it was debatable whether the judgment below was supported by an independent adequate nonfederal ground. *Stembridge* v. *Georgia,* 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 (1952).

Further, Rule 17 of the Supreme Court Rules provides that one ground for review on writ of certiorari is "(w)hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court, . . ." This Court stated in *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues."

The Court concluded at 76-77 that "[h]ad the statute been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance."

If this case is put in proper focus, it is not a case posing a federal question proper for this Court's consideration.

II.

THE OKLAHOMA CORPORATION COMMISSION IS AUTHORIZED TO PRESCRIBE RULES AND REGULATIONS FOR THE PLUGGING OF ALL ABANDONED OIL AND GAS WELLS AND TO ENFORCE SUCH RULES AS A VALID EXERCISE OF THE STATE'S POLICE POWER.

The extent of the Oklahoma Corporation Commission's authority under the police power of the state is well-settled. In *Gannon* v. *Mobil Oil Company,* 573 F.2d 1158, 1162 (10th Cir. 1978), *cert. den.* 439 U.S. 867, 99 S.Ct. 192, 58 L.Ed.2d 177, the Court stated:

> "The Oklahoma Corporation Commission was created by Article IX of the Oklahoma Constitution in 1907. Under present day statutes, the Commission has broad power to prescribe rules and regulations governing the plugging of all abandoned oil and gas wells. * * * The authority of the Oklahoma Corporation Commission, under the governing statutes, has been consistently recognized in the rule making area to be that of promulgating rules requiring adequate and proper plugging and abandonment of an oil and gas well under the state's police power in order to prevent waste and pollution and to provide for the safety of the public generally. *Wakefield* v.

State, 306 P.2d 305 (Okl. 1957); *Sheridan Oil Company* v. *Wall,* 187 Okl. 398, 103 P.2d 507 (1940); *Magnolia Petroleum* v. *Witcher,* 141 Okl. 175, 284 P. 297 (1930)."

As early as 1928, the Oklahoma Supreme Court found adequate authority for the exercise of the state's police power under Section 8015, O.S. 1921, the present Title 17, Section 53. The Court stated in *Bryan* v. *State,* 133 Okl. 213, 271 P. 1020, 1021 (1928), that "There is no controversy as to the jurisdiction or power of the Corporation Commission to order and enforce the plugging of an abandoned oil and gas well, nor as to its authority to prescribe rules and regulations therefor."

Since the Corporation Commission's authority and jurisdiction is limited to only "such jurisdiction and authority as is expressly or by necessary implication conferred upon it by the Constitution or statutes of this state," *Planters' Cotton & Ginning Company* v. *West Brothers,* 82 Okl. 145, 198 P. 855 (1921), *Oklahoma City* v. *Corporation Commission,* 80 Okl. 194, 195 P. 498 (1921), "the courts, therefore, should be careful and neither attempt to enlarge nor take from the jurisdiction conferred on the Commission." *Atchison, T. & S.F. Ry. Company* v. *Corporation Commission,* 68 Okl. 1, 170 P. 1156, 1159 (1914).

III.

THE OKLAHOMA CORPORATION COMMISSION'S RULES AND REGULATIONS REGARDING THE PLUGGING OF ALL ABANDONED OIL AND GAS WELLS IMPOSES A RESPONSIBILITY AND DUTY UPON THE OPERATOR OF SUCH WELLS AND DOES NOT ATTACH TO THE LAND ITSELF.

Since the early days of statehood, Oklahoma has been concerned with the conservation of oil and gas. To this end, one of the first conservation statutes enacted was a plugging statute which required the use of cedar plugs in plugging operations. Okla. Laws 1909, c. XXVI, art. II, sec. 7a. In 1917, the Oklahoma Corporation Commission, by Order No. 1299, issued a regulation as to the manner of plugging wells and required an operator to notify a Commission field inspector so that such inspector would be present to see that the well was properly plugged. However, in subsequent years, and in response to the problem of unscrupulous operators and their disregard of plugging regulations, the Commission; in 1946, by Order No. 19334, issued regulations which required that no person could plug a well without being licensed by the Corporation Commission. The plugging statutes of Oklahoma have changed somewhat through the years culminating in the present plugging statutes found at Title 52, Sections 309 through 318.1, and such statutes must be read in conjunction with Title 17, Section 53, which authorized the Corporation Commission to promulgate rules and regulations regarding the plugging of wells, and the rules and regulations promulgated by that authority. In all cases, the plugging statutes of this state may be interpreted as im-

posing the duty and responsibility upon the operator to properly plug the wells.

Although Petitioners' brief is exhaustive in reference to United States constitutional grounds and federal statutory and regulatory grounds, there appears little that is applicable to the question presented herein, since the order complained of imposes a duty on the operator and does not attach to the land itself. Nowhere in Petitioners' brief is this issue addressed nor is there any discussion or argument on the laws of Oklahoma or the rules and regulations of the Oklahoma Corporation Commission regarding plugging.

The case of *Salmon Corporation* v. *Forest Oil Corporation*, 536 P.2d 909 (Okl. 1975), is of relevance to the issue in this cause. In *Salmon*, the plaintiff sought to recover damages in recoupment of its costs in reentering and plugging, or replugging, 71 old wells previously operated by its predecessors. All of the wells were located on land which belonged to the Osage Tribe. The plugging requirements followed by the predecessor were those prescribed by the Osage Indian Agency. On appeal, Salmon urged that the predecessor was required to comply with the Oklahoma Corporation Commission rules regarding plugging as well as the regulations of the Osage Indian Agency. The Court, at 913, found "no reversible error in the trial court's failure to so instruct the jury because Salmon points to no Commission rule or regulation *imposing a greater duty* on those in Forest's situation then (*sic*) imposed by the Osage Agency's requirements." (Emphasis added). Although *Salmon* concerns wells drilled on Osage land and, therefore, under the regulations of the Osage Indian Agency,

and not the U.S.G.S., the language of the Court, nevertheless indicates that where a greater duty is imposed by the Oklahoma Corporation Commission rules, compliance must be made with such Commission rules.

At the time the wells in question herein were plugged, 25 CFR Sec. 174.33, under the auspices of the U.S.G.S., required the lessee "to plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata." This was also the scope of the Commission rules at the time the wells were plugged. However, in addition, the Oklahoma Corporation Commission rules, at that time, specifically required that the open hole below the casing shoe be filled with mud or cement to a point 25 feet above the shoe or, if impractical, a 25-foot plug be set extending at least 25 feet above the casing shoe; no surface casing was to be pulled unless authorized by the Commission; and a plug or seal was to be placed at the surface so as not to interfere with soil conservation. At the hearing before the trial examiner of the Corporation Commission, a witness for the Commission testified that if the 5½-inch casing was cemented and left in the hole and cement placed in the bottom and the top according to the rules, the plugging should hold against flood injection. These plugs did not hold. Whether such failure was due to improper plugging is undocumentable because the Corporation Commission did not receive the required notice of intent to plug, therefore, a Corporation Commission field inspector could not be present, as required by the rules, to witness the plugging and report thereon.

Therefore, under the Court's finding in *Salmon*, Petitioners herein were required at the time of plugging to

also comply with the rules and regulations of the Commission. It should be noted at this point that Petitioners were aware of the Corporation Commission's rules and regulations in that Petitioners did file a plugging report, albeit improper, on the Sophie Harrison B-1.

In *Minshall* v. *Corporation Commission*, 485 P.2d 1058 (Okl. 1971), Minshall attacked the validity of a Corporation Commission order requiring him to plug or repair an oil or gas well that had been abandoned and plugged in 1941, and that was later found to be leaking gas. The court, at 1060, found the purpose and intent of 52 O.S. Sections 309 through 317, enacted in 1965:

> "was to protect the waters and lands within this state against pollution caused by salt water, oil, gas, or other deleterious substances, presently leaking from abandoned wells, by providing a means whereby such presently-leaking wells 'may be plugged, replugged, or repaired; by or under the authority and direction of the Corporation Commission,' without affecting any existing means or remedy. * * * The 1965 act was intended to apply, and does apply, with respect to, any and all abandoned wells which are presently leaking salt water, oil, gas or other deleterious substances. If an abandoned well is not presently leaking any of those substances, the act has no application thereto. If it is presently leaking any of those substances, it makes no difference that the well has been plugged, or when it was plugged. *If the well has been plugged, the question of whether or not it was properly plugged in accordance with the then-effective rules and regulations of the Commission is not involved.*" (Emphasis added.)

However, the Court went on to state that it could not sustain that portion of the Commission order requiring Minshall to replug or pay for the cost of replugging since the Commission was not authorized to require any one to do the remedial work or to determine who that person may be.

Minshall was explained and clarified eight years later in *Ashland Oil, Inc.* v. *Corporation Commission,* 595 P.2d 423 (Okl. 1979). During that eight-year period, the Legislature, in 1970, amended 52 O.S. Sec. 310 to provide:

> "* * * (b) that the operator or any other person responsible for plugging, replugging or repairing the well in such manner as is necessary to prevent further pollution cannot be found, or is finacially unable to pay the cost of performing such work * * *."

The Court stated, at 425, that:

> "Without question, this provision supplies the explicit legislative imposition of the *operator's* liability for 'plugging, replugging or repairing' which was found missing at the time *Minshall* was decided. Consideration of this provision together with numerous other statutory declarations leaves absolutely no room for doubt that the Corporation Commission has the statutory power to order an operator to replug wells which were improperly plugged."

Of particular importance is the case of *Amax Petroleum Corporation* v. *Corporation Commission*, supra, wherein the Corporation Commission ordered the plugging of certain gas wells which had been abandoned by the operator in 1957. About two years after abandonment, the operator assigned the lease to the landowner. The Court stated at 391:

> "Thus, the person to plug the well is the lease operator, not a stranger to the operation; and the time to plug is when the well is abandoned and certainly not before."

In response to the appellant's contention that the delay by the Corporation Commission in filing the application for such order should relieve the operator of his responsibility in the matter, the Court stated at 392 that "while this delay is unfortunate, no reason is presented to us as to why this would set aside the lease owner-operator's duties and obligations and we see none. The delay resulted in the failure to plug the wells which the Corporation Commission has held is the appellant's obligation."

The rule that the lease operator is responsible for the plugging of the well has been affirmed at the federal level in *Gannon* v. *Mobil Oil Company,* supra, at 1162:

> "Oklahoma law provides that upon abandonment of an oil well the owner or operator is obligated, responsible and liable for plugging the well in accordance with the applicable rules of the Corporation Commission. 17 Okla. Stat. Ann. 1971, Sec. 53; 52 Okla. Stat. Ann. 1971, Sections 273, 309 and 310; OCC-OGR Sec. 3-401(a); *Loriaux* v. *Corporation Commission,* 514 P.2d 941 (Okl. 1973); *United States* v. *79.95 Acres of Land, etc., Rogers County, Okl.,* 459 F.2d 185 (10th Cir. 1972); *Bryan* v. *State,* 133 Okl. 213, 271 P. 1020 (1928)."

IV.

PUBLIC LAW 80-336, FOUND IN 61 STAT. 731, ACT OF AUGUST 4, 1947, CH. 458, EVIDENCES CONGRESS' INTENT THAT ALL OIL AND GAS CONSERVATION LAWS OF THE STATE OF OKLAHOMA APPLY TO ALL RESTRICTED LANDS OF THE FIVE CIVILIZED TRIBES.

Section 11 of Public Law 80-336, 61 Stat. 731, Act of August 4, 1947, ch. 458, provides:

> "Sec. 11. All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: Provided, That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative."

It is the Respondents' contention that the proviso found in Section 11 is inapplicable to the case since the order issued by the Corporation Commission does not affect restricted Choctaw land but only the operator, Currey & Currey. However, Petitioners contend that said Section 11 is applicable herein and contend the proviso acts as a nullifier. To determine which contention is correct resort must be had to the rules of statutory construction found in the following cited cases.

In *United States* v. *Wewoka Creek W. & S. Con. Dist. No. 2 of Okl.*, 222 F.Supp. 225 (E.D. Okl. 1963), the Court sought to construe another proviso found in the Act of August 4, 1947. That proviso was found in Section 6(b) of the Act regarding tax exemptions. The question presented in *Wewoka Creek* was the same question presented here:

what is the intent and meaning of Congress as to the proviso? The Court stated at 230:

> "It is generally stated that the purpose of a proviso engrafted upon a preceding enactment is to restrict or modify the enacting clause or exempt something from its operation, but such is not always the purpose. The cardinal rule in construing a statute is that the Court must ascertain and give effect to the legislative intent, and this rule applies equally well to the construction of provisos. The enacting clause and the provisos should be construed together with a view to giving effect to each in carrying out the intention of the legislature as manifested in the entire Act."

The Court in the case of *Motorlines, Ltd.* v. *United States,* 215 F.Supp. 345 (N.D. Ohio 1963), was also presented with a question as to the correct interpretation of a proviso. In *Motorlines,* the Court stated at 348:

> "It is true that the natural and appropriate office of a proviso is to modify that portion of the statute immediately preceding it. 50 Am.Jur., Sec. 38, p. 459. However, a proviso should be given a broader application when it is clear that the legislature so intended. Ibid. Here the proviso does not serve to qualify the statute. It introduces new matter rather than limiting or explaining that which had gone before. 50 Am.Jur., Sec. 456. In *Georgia R.R. & Banking Co.* v. *Smith,* 128 U.S. 174, 9 S.Ct. 47, 32 L.Ed. 377, the Supreme Court had this to say about provisos:
>
> " 'The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the

> statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. Several illustrations are given by counsel of the use of the term in this sense, showing, in such cases, where an amendment has been made, though the provision following often has no relation to what precedes it.' (p. 181, 9 S.Ct. p. 49)"

Further, in *Gruver* v. *Secretary of Health, Education and Welfare,* 426 F.2d 1195 (Ct. App. D.C. 1969), *cert. den.* 397 U.S. 977, 90 S.Ct. 1092, 25 L.Ed.2d 272 (1970), the Court states that "as a general proposition, a proviso presumably refers only to the provision to which it is annexed, but this presumption, like all others, must invariably yield to the cardinal principle that the intention of the legislature must be heeded. A proviso escapes the narrow confines of its parent provision if to so imprison it would frustrate expressed or inferable legislative aims."

Petitioners herein contend that the proviso found in Section 11 of the Act of August 4, 1947, Public Law 80-336, ch. 458, 61 Stat. 731, is a condition precedent which serves to nullify the general statement preceding it. This is incorrect. By ultilizing the rules of statutory construction found in the above-cited cases, the proviso is clearly a condition subsequent. To paraphrase the provision: All Five

Civilized Tribal lands are subject to all Oklahoma oil and gas conservation laws subject to the procedural command of approval of the Corporation Commission order by the Secretary of the Interior. As in the *Motorlines* case, the proviso "introduces new matter rather than limiting or explaining that which had gone before." Such is the case with the proviso in Section 11. In addition, an order of the Oklahoma Corporation Commission does not issue for enforcement of every oil and gas conservation law of Oklahoma. For example, 52 O.S. Section 296, provides:

> "No inflammable product from any tank, pool or stream used for watering stock; and all waste of oil and refuse from tanks or wells shall be drained into proper receptacles at a safe distance from the tanks, wells or buildings, and be immediately burned or transported from the premises, and in no case shall it be permitted to flow over the land. Salt water shall not be allowed to flow over the surface of the land."

Action taken under this section is to be brought in district court under the provisions of 52 O.S. Section 303.

It was stated by the Court in *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116 (10th Cir. 1979), *cert. den.* 444 U.S. 995, 100 S.Ct. 530, 62 L.Ed.2d 426 (1979):

> "It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962)."

In any case, as has been reiterated earlier, the Corporation Commission order herein is directed to a specific operator, Currey & Currey, and does not extend to the federal government, the Indian owner or the land in question.

CONCLUSION

This is not a case of first impression since the Oklahoma Corporation Commission does not seek to obtain regulatory authority over exploration on restricted Indian (Choctaw) land. The Oklahoma Corporation Commission seeks to enforce an order directed against the operators of a well whose responsibility and obligation was to properly plug their wells.

The fact that Oklahoma has not acted to remove its state constitutional disclaimer is irrelevant in this case as the order is directed to the operator of the well and not the land itself. This principle has been repeated throughout this brief in opposition and can be cited against every argument urged by Petitioners.

Respondents pray, therefore, that this Court not grant Petitioners' petition for writ of certiorari.

Respectfully submitted,

By: _____
ALICE SCHAFFER MITCHELL

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Brief in Opposition were mailed to the person listed below on the _____ day of March, 1981, by placing same in the U. S. Mail with postage fully prepaid.

All parties required to be served have been served.

Larry R. Boyd
8th Floor, Heritage Square
II
5001 L.B.J. Freeway
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Alice Schaffer Mitchell

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

P. W. Currey and Mrs. James D. Currey d/b/a Currey & Currey a/k/a Currey, Shields & Currey,	)	
Appellants,	)	No. 51,906
vs.	)	Filed June 12, 1979
	)	Ross N. Lillard,
Corporation Commission of Oklahoma; Dan R. Dunnett, Director of Conservation for Corporation Commission of Oklahoma,	)	Jr., Clerk Supreme Court State of Oklahoma
Appellees.	)	

Appeal from Order of Corporation Commission directing Appellants to replug abandoned oil and gas wells which are purging salt water onto the surface of the land.

ORDER OF THE CORPORATION COMMISSION AFFIRMED

Manville T. Buford,
Buck, Crabtree, Ransdell & Buford,
Oklahoma City, Oklahoma, For Appellants;

Harvey Cody,
Conservation Attorney,
Nathan S. Sherman,
Assistant Conservation Attorney,
Oklahoma Corporation Commission, For Appellees.

WILLIAMS, J.

Appeal is taken by P. W. Currey and Mrs. James D. Currey d/b/a Currey & Currey a/k/a Currey, Shields & Currey (Appellant/Currey) from Order No. 137283 of the

Corporation Commission (Commission) directing Currey to replug two wells located in Stephens County.

Appellant obtained oil and gas exploration lease rights to restricted Choctaw lands located in Stephens County, Oklahoma. The lease was obtained through the Bureau of Indian Affairs (BIA), which then turned direct supervision to the United States Geological Survey (USGS).

Evidence adduced before the Trial Examiner for the Commission disclosed further that Currey drilled three wells, "Sophie Harrison No. 1," "Sophie Harrison No. B-1" and "Sophie Harrison No. B-2" (wells). All three wells were abandoned in the mid-1950's. The wells were thereafter plugged, and appropriate reports made to USGS. Parties disagree as to the degree of compliance with Commission filing requirements, but both agree that Currey did not fully comply with all Commission filing requirements.

In 1976 Continental Oil Company, an adjacent and contiguous lessee, discovered salt water purging from one of Currey's wells. Continental informed the Commission, which thereafter inspected the site, found one well to be purging and issued a complaint. The complaint was later amended to encompass another well found to be purging.

Extensive testimony was taken by the trial examiner regarding compliance with USGS plugging requirements and conformity to Commission filing requirements. The degree of compliance is not determinative.

It is not disputed that the wells were drilled and operated by Currey over twenty years ago, and that now two of these wells are spewing forth salt water in excess of forty barrels a day onto the land.

Appellant contends generally that the Corporation Commission has no jurisdiction to order reworking or replugging of wells because the wells are located on restricted Indian lands under exclusive jurisdiction of the Federal Government.

Appellant Currey further argues that even if the Federal Government lacks exclusive jurisdiction, still the Commission is without statutory authority to compel replugging. We shall deal with the second argument first.

Appellant relies heavily on *Minshall* v. *Corporation Commission*, Okl., 485 P.2d 1058 (1971), which has been further clarified by *Ashland Oil, Inc.* v. *Corporation Commission*, ___ P.2d ___. *Ashland supra* clarifies *Minshall* and addresses itself more specifically to such facts as are involved in the case at bar as follows:

> Ashland urges on appeal that Minshall v. Corporation Commission, Okl. 485 P.2d 1058 (1971) controls. In *Minshall*, the Corporation Commission found that a well drilled, plugged, and abandoned by Minshall was leaking gas through and onto the ground. Apparently relying upon 52 O.S. Supp. 1965, Sec. 310[1], the Commission ordered Minshall to replug the well.
>
> On appeal, the *Minshall* court stated in its syllabus: 'Neither 17 O.S. 1961, Sec. 53, nor any of the provision of Senate Bill No. 396 of the Thirtieth (1963) Oklahoma Legislature (Chapter 191 O.S.L. 1965; 52 O.S. Supps. 1965-1969, Sections 309 through 317) imposes upon any one an obligation to replug, or repair, an abandoned well that has been plugged but is presently leaking salt water, oil, gas, or other deleterious substances.'
>
> . . . At page 1061 of *Minshall*, we read: * * * If the well has been plugged, the question of whether or not it was properly plugged in accordance with the then-effective rules and regulations is not involved.'

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[1] Amended by Laws 1970, c.217, Sec. 2.

> Additionally, as the Commission correctly points out, the Court in *Minshall* clearly limited its consideration to the application of 52 O.S. Supps. 1965-1969, Sections 309-315 on the question of an operator's responsibility and did not concern itself with amendments to that Act enacted subsequent to the order of the Commission or with any other existing statutes.
>
> For purposes of the instant action it is important to note that the Court did not consider the impact of the 1970 Amendment to Sec. 310 (Laws 1970, ch. 217, Sec. 2) which provides: '* * * (b) that the operator or any other person responsible for plugging, replugging or repairing the well in such manner as is necessary to prevent further pollution cannot be found, or is financially unable to pay the cost of performing such work. * * *'
>
> Without question, *this provision supplies the explicit legislative imposition of the operator's liability for 'plugging, replugging or repairing' which was found missing at the time of Minshall was decided.* Consideration of this provision together with numerous other statutory declarations[2] leaves absolutely no room for doubt that the Corporation Commission has the statutory power to order an operator to replug wells which were improperly plugged. * * * (Emphasis added).

The record reveals the Commission's finding that the wells were not properly plugged was supported by substantial evidence. This Court is not required to weigh the evidence on appeal, but to review the evidence and affirm the order where the finding and conclusions of the Com-

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[2] 17 O.S. 1971, Sections 51, 53; 52 O.S. 1971, Sections 86.2, 86.3, 236-247, 271-279, 309-320; 52 O.S. Supp. 1975, Sec. 102.

mission are sustained by law and substantial evidence. O.S. 1971 Const. Art. 9 Sec. 20; *Superior Oil Co.* v. *Oklahoma Corporation Commission*, Okl., 242 P.2d 454 (1952). Assuming Oklahoma has jurisdiction over wells drilled on restricted Indian land, the Commission has the authority to order reworking or replugging of these wells, and we so hold.

Next requiring attention is appellant's second major argument that because the wells were drilled on restricted Indian lands Oklahoma is without jurisdiction.

Currey cites as authority O.S. 1971 Const. Art. I sec. 3 as follows:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

and Public Law No. 83-280, 67 Stat. 588 (1953), which in pertinent part states:

> Sec. 6 Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, *where necessary*, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of the Act: * * *. (Emphasis added).

Appellant simply argues that the Constitutional impediment under Sec. 3 *supra* has not been properly removed by any Constitutional amendment. Appellant proceeded on the assumption that if a right is held by the Federal

Government and later abrogated, then there must be an affirmative corresponding state enactment to fill the void. This assumption is erroneous.

A federal district court held[3] in construing P.L. 280 *supra* that: "Congress, under the constitutional power to regulate commerce with the Indians, has preempted the field of regulation of Indian land *to the extent that such is necessary* to protect the Indians' rights therein and to preserve title thereto until the day when the Indian has developed culturally to a point where he can deal and manage his own affairs."

The Court goes on further to say that, "Congress in recent years has recognized that Indians in some states, . . . have reached a state of acculturation where some federal controls might properly be relaxed. * * * Public Law 280, like other similar laws in recent years, is a withdrawal by Congress from its preemption in this field. It has done so in this case by express grant to the state of authority, among other things, to exercise its police power in such a way as to impose upon Indian lands the same regulations imposed upon all lands within the boundaries of the state. To the extent that any further withdrawal by the Federal Government occurs, the sovereignty of the state becomes enlarged to *that extent.*" (Emphasis added).

In 1947, prior to the drilling and plugging of the wells in question, Public Law 80-336, found in 61 Stat. 731, Act of August 4, 1947 Ch. 459, was passed by the Congress of the United States. Section 11 of said Act specifically withdraws Congress from preemption in the field of oil and gas conservation and thereby enlarged the sovereignty of Oklahoma to that extent. It reads:

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[3] The Agua Caliente Band of Mission Indians' Tribal Council et al. v. The City of Palm Springs, etc., et al., (D.C., Cal.), 347 F.Supp. 42 (1972).

"11. All restricted lands of the Five Civilized Tribes are hereby made subject to *all* Oil and Gas Conservation laws of the State of Oklahoma; . . ." (Emphasis added).

No affirmative statutory enactment was necessary for Oklahoma to assume jurisdiction abrogated by the federal government.

The United States Supreme Court in Organized Village of Kake v. Egan, 369 U.S. 60 (1962), in an opinion by Mr. Justice Frankfurter, construed an Alaskan conservation law, in light of a Constitutional provision similar to Oklahoma's Article I, Sec. 3. Indian communities brought an action against the Governor of Alaska to enjoin enforcement of the Alaska Anti-Fish Trap Conservation Law.

The principal dispute concerned, ". . . the meaning of sec. 4 of the Statehood Act, in which the State disclaimed all right and title to and the United States retained absolute jurisdiction and control over, inter alia, 'any lands or other property . . ., the right or title to which may be held by any Indians . . .' or is held by the United States in trust for said natives." Organized Village of Kake, *supra*, at p. 565.

The Court states further at page 567 that:

> Although the reference to fishing rights is unique, the retention of 'absolute' federal jurisdiction over Indian lands adopts the formula of nine prior statehood acts. Indian lands in Arizona remained 'under the absolute jurisdiction and control' of the United States, 36 Stat. 557; Yet in Williams v. Lee, 358 U.S. 217, 220, 223, 79 S.Ct. 269, 270, 272, 3 L.Ed.2d 251, we declared that the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self government. The identical language appears in Montana's Admission Act, 25 Stat. 676, 677. Yet in Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, 41 L.Ed. 419, the Court held that

a non-Indian on a Montana Reservation could be prosecuted only in the state courts. * * *

Draper and Williams indicate that *'absolute' federal jurisdiction* is *not* invariably *exclusive jurisdiction.* (Organized Village of Kake, *supra.*) (Emphasis added).

Oklahoma's disclaimer of right and title to Indian lands is a disclaimer of proprietary rather than governmental interests. "The State may well waive its claim to any right or title to the lands and still have all of its political or police power with respect to the actions of the people on those lands, as long as that does not affect the title to the land." *Kake, supra.*

We hold that the power of the Corporation Commission to regulate oil and gas conservation measures under the laws of the state on restricted Indian lands and order appellant to replug purging wells, is not precluded by the federal jurisdiction. Our Constitutional mandate contained in O.S. 1971 Art. I Sec. 3 stating that Indian lands "shall be and remain subject to the jurisdiction, disposal, and control of the United States", envisions undiminished and not exclusive jurisdiction. We so hold.

CONCUR: Hodges, Barnes, Simms, Doolin and Hargrave, JJ.

CONCUR BY REASON OF STARE DECISIS: Lavender, C.J. and Opala, J.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

P. W. Currey and Mrs. James D. Currey d/b/a Currey & Currey a/k/a Currey, Shields & Currey,	)	
	)	No. 51,906
Appellants,	)	
	)	Filed September
vs.	)	22, 1980
	)	Ross N. Lillard,
Corporation Commission of Oklahoma; Dan R. Dunnett, Director of Conservation for Corporation Commission of Oklahoma,	)	Jr., Clerk
	)	Supreme Court
	)	State of Oklahoma
	)	
Appellees.	)	

CORRECTION ORDER

It is hereby ordered that the typewritten opinion of this Court filed and promulgated in the above styled case on the 12th day of June 1979, be ordered to be corrected and that is corrected as hereinafter set forth, that is to say that in the ninth line of page 6 of such typewritten opinion next following the end of the partial quotation which concludes with the words and grammatical symbol, to-wit: State of Oklahoma and next preceding the grammatical symbols and words, to-wit: . . . "(Emphasis added)., there be inserted (in lieu of the ellipsis symbol)' the following words and grammatical symbols, to-wit: Provided, that no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

It is further ordered that the vote of the Justices shown at the conclusion of such typewritten opinion (in

addition to the name of the author of the opinion occurring at the commencement of the body thereof) be corrected as follows:

BARNES, SIMMS, DOOLIN, and HARGRAVE, JJ. concur.

LAVENDER, C.J., and OPALA, J., concur by reason of stare decisis.

HODGES, J., dissents.

It is further ordered that such opinion and such language added and with said ellipsis symbol deleted (and as heretofore ordered corrected and so corrected, including correction of the vote of the Justices), shall otherwise remain in full force and effect.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE this 22nd day of September, 1980.

s/ Robert E. Lavender
Chief Justice

APPENDIX C

Oklahoma Statutes, Title 17, Section 53

Section 53. Rules and regulations — Plugging wells.

The Corporation Commission is hereby authorized to prescribe rules and regulations for the plugging of all abandoned oil and gas wells. The same shall be plugged under the direction and supervision of the conservation agents of the Corporation Commission. All orders and regulations in reference to plugging wells shall be made after general hearing as now prescribed by law for the promulgation of orders by the Corporation Commission.

Laws 1917, c.207, p.385, Sec. 3. C.S. 1921, Sec. 8015; St. 1931, Sec. 3671.

Oklahoma Statutes, Title 52, Sections 309 through 318.1

Section 309. Findings and declarations

The Legislature finds and declares that it is in the public interest to protect the waters and lands of the state against pollution and, for that purpose, it is necessary and desirable in the exercise of the police power of the state to provide additional means whereby wells drilled for the exploration, development, or production of oil or gas, or as injection or disposal wells, and which are causing surface or subsurface pollution of any fresh water or are leaking salt water, oil, gas or other deleterious substances upon the surface of the land, may be plugged, replugged, or repaired by the Corporation Commission or under the authority and direction of the Corporation Commission, hereinafter called "Commission."

Laws 1965, c.191, Sec. 1, eff. June 8, 1965. Amended by Laws 1970, c.217, Sec. 1, emerg. eff. April 15, 1970.

Section 310. Leaking wells — Entry upon land to plug, replug or repair — Emergencies

If after notice and hearing the Commission finds:

(a) that a well drilled for the exploration, development, or production of oil or gas, or as an injection or disposal well, is causing surface or subsurface pollution of any fresh water or is leaking salt water, oil, gas or other deleterious substances onto the surface of the land in the vicinity of the well; and

(b) that the operator or any other person responsible for plugging, replugging or repairing the well in such manner as is necessary to prevent further pollution cannot be found, or is financially unable to pay the cost of performing such work,

then the Commission or any person who is so authorized by the Commission may enter upon the land upon which such well is located and plug, replug, or repair such well as may be reasonably required to remedy such condition. If in the case of an emergency or if it otherwise appears to the Commission that irreparable injury will result if immediate remedial action is not taken, such entry upon the land may be made or authorized by the Commission, without notice or hearing, for the purpose of taking such temporary remedial action as the Commission may consider to be necessary to prevent or minimize such injury pending the giving of notice and hearing. Such operation shall be conducted in the manner prescribed by the Commission.

Laws 1965, c.191, Sec. 2, eff. June 8, 1965. Amended by Laws 1970, c.217, Sec. 2, emerg. eff. April 15, 1970.

Section 311. Liability for damages

Any person entering upon the land on which the well is located to plug, replug, or repair the same, pursuant to the authority and in accordance with the order of the Com-

mission, shall not be liable or held responsible for any damages resulting from operations reasonably necessary or proper to plug, replug, or repair the well, except damages to growing crops and improvements.

Laws 1965, c.191, Sec. 3, eff. June 8, 1965.

Section 312. Responsibility for future remedial work

Any person who plugs, replugs, or repairs a well in accordance with an order of the Commission under this act shall not be held to have assumed responsibility for future remedial work on said well or be liable in damages or otherwise for conditions subsequently arising from or in connection with said well.

Laws 1965, c.191, Sec. 4, eff. June 8, 1965.

Section 313. No admission of liability or discharge of action

The fact that any person has initiated or supported a proceeding before the Commission or has remedied or attempted to remedy the condition of any well under the authority of this act shall not be construed as an admission of liability or received in evidence against such person in any action or proceeding wherein responsibility for or damages from surface or subsurface pollution, or injury to any fresh water or oil or gas bearing formation is or may become an issue, nor shall such fact be construed as releasing or discharging any action, cause of action, or claim against such person existing in favor of any third person for damages to property resulting from surface or subsurface pollution, or injury to any fresh water or oil or gas bearing formation.

Laws 1965, c.191, Sec. 5, eff. June 8, 1965.

Section 314. Right of action for costs involved — Lien

Any person who had no obligation to plug, replug, or repair the well but who does so under the provisions of this act shall have a cause of action against the person or

persons who by law were obligated to properly plug, replug, or repair the well for the reasonable cost and expense incurred in plugging, replugging, or repairing the well, and shall have a lien upon the interest of such obligated person or persons in and to the oil and gas rights in the land and equipment located thereon.

Laws 1965, c.191, Sec. 6, eff. June 8, 1965.

Section 315. Supplemental remedy

Nothing in this act shall relieve any person or persons otherwise legally responsible from any obligation to properly plug, replug, or repair a well and shall not limit the authority of the Commission to require the proper plugging, replugging, or repair of the well, but is intended as a supplemental remedy when any person or persons obligated to do so fail or cannot be made to do so.

Laws 1965, c.191, Sec. 7, eff. June 8, 1965.

Section 316. Proceedings

All proceedings under this act including the filing of applications, giving of notices, the conduct of hearings and other action taken by the Commission, and appeals therefrom shall be in the form and manner and in accordance with the procedure provided in Sections 84 to 135, inclusive, Title 52 O.S. 1961, or any amendment thereof.

Laws 1965, c.191, Sec. 8, eff. June 8, 1965.

Section 317. "Person" defined

The term "person" as used in this act means any individual, business association or corporation, partnership, governmental or political subdivision, public corporation, body politic and corporate public authority, trust or any other legal entity.

Laws 1965, c.191, Sec. 9, eff. June 8, 1965.

Section 318. Remedial work — Contracts upon competitive bids

When the Commission undertakes to plug, replug, or repair any well or wells, as authorized and provided in Title 52 of the Oklahoma Statutes, Sections 309 and 310, all such remedial work shall be done by contracts let upon competitive bids. The Commission shall not expend from the Conservation Fund or any other fund in the State Treasury, in any fiscal year, for the purposes herein provided, an amount of money in excess of the total sum specifically authorized annually by the Legislature for such purposes.

Laws 1970, c.217, Sec. 3, emerg. eff. April 15, 1970.

Section 318.1. Agreement as to compliance with drilling and plugging regulations — Recovery of costs

Any person who drills or operates any well for the exploration, development or production of oil or gas, or as an injection or disposal well within the State of Oklahoma, shall furnish on forms approved by the Corporation Commission, his agreement in writing to drill, operate and plug wells in compliance with the rules and regulations of the Commission and the laws of the State of Oklahoma together with his financial statements showing his net worth is not less than Ten Thousand Dollars ($10,000.00) within the State of Oklahoma. Said financial statement to be made current semiannually. The agreement shall provide that if the Commission determines that he has neglected, failed, or refused to operate, plug or replug any well or operate any facility in compliance with the Commission's said rules and regulations he will forfeit or pay to the state, through the Commission, for deposit in the State Treasury, a sum equal to the cost of plugging the well, and the Commission may cause such remedial work to be done, issuing warrant in payment of the cost thereof drawn upon the State Treasury against the monies accruing therein from the forfeiture. Any monies accruing to the State Treasury by

reason of a determination that there has been a noncompliance with the provisions of said agreement or the rules and regulations of the Commission, in excess of the cost of remedial action ordered by the Commission, shall be credited to the Conservation Fund. The Commission shall also recover any costs arising from litigation necessary to the enforcement of this provision.

Added by Laws 1971, c.25, Sec. 1, emerg. eff. March 22, 1971.